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August 30, 2005

**BY HAND DELIVERY**

Administrator  
Agricultural Marketing Service, USDA  
Rm 307-S  
Ag Stop 020  
1400 Independence Avenue, SW  
Washington, DC 20250-0201

**Re: FOIA APPEAL  
FOIA No. 89-05**

Docket Number FV03-925-1PR  
Grapes Grown in a Designated Area of Southeastern California  
And Imported Table Grapes; Proposed Change in Regulatory Periods

Dear Sir/Madame:

Pursuant to 7 C.F.R. §1.14, the undersigned counsel for ASOEX, Asociacion de Exportadores de Chile, also known as the Chilean Exporters Association, hereby appeals the agency's response to FOIA Request No. 89-05 dated July 26, 2005.

**BACKGROUND**

On June 3, 2005, ASOEX requested, under the Freedom of Information Act, a copy of all the material upon which USDA relied in proposing the above-captioned rule. [June 3, 2005 request is attached hereto as Exhibit 1]. On July 6, 2005, one day after the statutory due date for initial response, and after a number of phone calls and e-mails inquiring as to the status of the request, ASOEX received an interim response from USDA indicating that they had "located documents responsive to our requests items 1, 2, 3, 6, 7, 8, 9, and 11" and advising us of the amount of costs associated with the request. [The interim response letter is attached as Exhibit 2.] USDA indicated that there were no documents relating to items 4, 5, 10 or 12. On July 26, 2005, almost two months after the initial request, USDA made a partial production, which included responses to only items 1, 2, 3, 6, 7, 9 and 11. [The cover letter is attached as Exhibit 3]. USDA withheld the previously located and identified documents responsive to #8 and "approximately 360 pages of vessel browser reports for the period

2000 to 2004 prepared by the California Desert Grape League based on data from Sermaco, Inc.” The July 26 letter stated that the agency was in the process of obtaining and considering the views of the proprietary interest holder, and that ASOEX would receive a response concerning the vessel browser reports after consideration of any comments received from the reports’ proprietary interest holder. To date, ASOEX has not received USDA’s final determination as to the disclosure of the vessel browser reports.

## REASONS FOR APPEAL

First, USDA’s response letter dated July 26, 2005 fails to provide the reasons for withholding the previously identified documents responsive to Item 8, and the name and title or position of person responsible for denial of the request, contrary to the regulatory mandate under 7 C.F.R. §1.7(a). In addition, in withholding the vessel browser reports originally issued by Sermaco, Inc., USDA implied but failed to provide the precise reason for withholding the information and the name and title or position of the person responsible for denial of the request. At minimum, USDA’s formal response must be supplemented to provide these missing pieces of information. Because ASOEX has not been properly provided with the actual reasons for the agency’s denial of its FOIA request, ASOEX reserves its right to revise the basis for this appeal at a later date, as becomes necessary.

Second, the withheld information responsive to Item 8 concerns USDA’s own inspection data on Chilean grapes in the month of April from 2000-2005. The agency already has located and identified the documents responsive to Item 8, as the July 6, 2005 interim response letter clearly stated. Under 7 C.F.R. §1.19, all agency records, except those specifically exempted from mandatory disclosure by one or more provisions of 5 U.S.C. §552(b), “*shall be made promptly available* to any person submitting a request.” (emphasis added.) None of the exemptions are apposite here. ASOEX respectfully request that any documents previously identified as responsive to Item 8 be produced immediately.

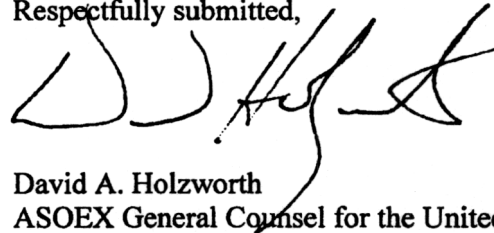
Third, the Sermaco vessel browser reports were “*prepared by the California Desert Grape League based on data from Sermaco, Inc*” according to the July 26, 2005 response letter. Therefore, to the extent the reports contain Desert Grape League’s summarization or analyses of Sermaco data, any claim Sermaco may have on the raw data for FOIA exemption should be inapplicable. Moreover, USDA has not maintained that Sermaco data is exempted as trade secret, commercial or financial information under 5 U.S.C. §552(b)(4). Nor has USDA stated that the data were privileged or confidential or that the disclosure is likely to cause substantial competitive harm to Sermaco, Inc. *See, Acumenics Research & Tech. v. U.S. Dep’t of Justice*, 843 F.2d 800, 807 (4th Cir. 1988) (FOIA Exemption 4 covers (1) trade secrets and commercial or financial information, (2) obtained from a third person outside the government, (3) that is privileged or confidential.); *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988) (the party seeking to avoid disclosure under Exemption 4 must show the likelihood of substantial competitive harm.). Furthermore, the Sermaco data is taken from vessel shipment-related documents, not the type of information usually protected from disclosure under Exemption 4. *See, e.g., McDonnell Douglas Corp. v NASA*, 180 F.3d 303 (D.C. Cir 1999) (government contractor’s line-item prices); *Herrick v. Garvey*, 298 f.3d 1184 (10th Cir. 2002) (airplane specification documents).

The above-captioned proposed rule placed a particular emphasis on the Sermaco reports as evidence to support the contention that Chilean grapes were “circumventing” Table Grape Import Regulation No. 4. ASOEX and affiliated interests cannot participate in the rulemaking process in a

meaningful manner, unless all the material and data presented to and relied upon by the agency in proposing the new rule is fully disclosed. ASOEX and affiliated interests must have an adequate opportunity to examine the data before submitting their comment in opposition to USDA's proposed rule. In the absence of full disclosure, ASOEX is deprived of an adequate opportunity to participate in the comment procedure and any final rule will be rendered invalid. *See, e.g., United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 534 (D.C. Cir 1978) *citing Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C.Cir. 1973) (Information in agency files or reports identified by the agency as relevant to the proceeding must be disclosed to the parties for adversarial comment.).

The mere fact that information falls within 5 U.S.C. §552(b) does not prohibit its disclosure. *Superior Oil Co. v. Federal Energy Regulatory Com.*, 563 F.2d 191 (5th Cir. 1977). ASOEX respectfully requests that all the withheld documents responsive to ASOEX's FOIA request be promptly produced.

Respectfully submitted,



David A. Holzworth  
ASOEX General Counsel for the United States

CC: Delaware, New Jersey and Pennsylvania Congressional Delegations  
United States Trade Representative  
Director, Office of Management and Budget  
Maritime Exchange for the Delaware River and Bay  
Delaware River Port Authority  
Embassy of Chile  
Mr. George Kelhart, AMS USDA

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June 3, 2005

**BY FAX AND HAND DELIVERY**

Ms. Zipora Bullard  
FOIA/PA Officer  
Rm 3517-S  
Ag Stop 0202  
Agricultural Marketing Services, USDA  
1400 Independence Avenue, SW  
Washington, DC 20250-0273

**Re: Freedom of Information Act Request for Reports and Data**

Docket Number FV03-925-1PR  
Grapes Grown in a Designated Area of Southeastern California  
And Imported Table Grapes; Proposed Change in Regulatory Periods

Dear Ms. Bullard

On behalf of ASOEX, a trade association of Chilean fruit growers and fresh fruit exporters whose members account for approximately 90% of Chilean table grape imports to the United States, I am requesting the information listed below pursuant to the Freedom of Information Act, 5 U.S.C. §552 USDA/AMS referenced and discussed these data and reports as the bases for their decision in the above-referenced proposed rule, a copy of which is attached hereto for your reference.

The following information is requested:

- 1 All reports in support of the proposed rulemaking that were provided to AMS/USDA by the California Desert League (hereafter "League") and the data upon which the reports were based;
2. All reports and the data upon which they are based that AMS/USDA reviewed and/or relies upon in support of the proposed rulemaking;



- 3 All reports and supporting data provided by the League that shows a high percentage of imported grapes that were subjected to voluntary inspections and failed to meet the requested quality checks;
- 4 All reports and/or data that would allow an analysis of the percentage of domestic grapes that were subjected to voluntary inspections for the period after August 15 of each of the last three years;
- 5 All data for the last three years that reflects the use of storage by domestic producers of table grapes for the period after July 10 of each year;
- 6 All data that AMS/USDA collected and analyzed that supports the statement made in the proposed rulemaking that "we would not expect a shortage of grapes in the market with an earlier effective date for section 8e import requirements", including the data that AMS/USDA analyzed to determine at what levels of imports a "shortage" occurs;
- 7 Copies of all the inspection data and the weekly summaries of such data compiled by the League for the period February through April for the years 2000 through 2005;
- 8 Copies of all inspection data and summaries independently compiled by AMS/USDA for the period February through April for the years 2000 through 2005;
9. All studies of table grape importer storage behavior performed by SURRES;
10. All studies of domestic table grape storage behavior performed by SURRES or any other entity upon which AMS/USDA relies in this rulemaking;
- 11 The California Desert Grape Administrative Committee Annual Reports for the years 2000 through 2005;
- 12 Any analyses performed or data relied upon by AMS/USDA to measure the economic impact on the Delaware River port region of the proposed rulemaking.

The notice of the proposed rule lists the following individuals as contact persons who are familiar with the above-referenced proposed rulemaking:

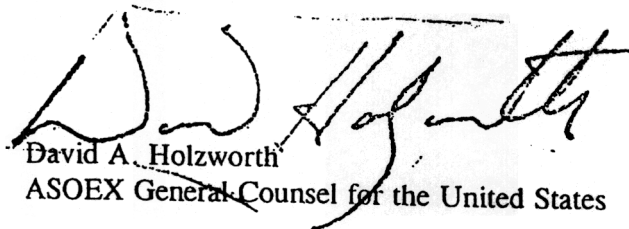
Mr. George Kelhart  
STOP 0237  
Marketing Order Administration Branch  
Fruit and Vegetable Program  
Agricultural Marketing Service, USDA  
1400 Independence Avenue, SW  
Washington, DC 20250-0237  
Tel: 202-720-2491  
Fax: 202-720-8938

Ms. Rose Aguayo or Mr. Kurt Kimmel  
Marketing Order Administration Branch  
Fruit and Vegetable Program  
Agricultural marketing Service, USDA  
2202 Monterey Street, Suite 102B  
Fresno, CA 93721  
Tel: 559-487-5901  
Fax: 559-487-5906

We will bear all the reasonable costs related to the production of the requested information. If you deny any part of this request, please cite each specific reason that you think justifies your refusal to release the information. Please notify me of appeal procedures available under the law.

If you have any questions processing this request, please do not hesitate to contact me.

Respectfully submitted,



David A. Holzworth  
ASOEX General Counsel for the United States

Attachment

CC: By E-Mail and Hand Delivery

Mr. George Kelhart  
Marketing Order Administration Branch  
Fruit and Vegetable Programs  
Agricultural Marketing Service, USDA  
1400 Independence Avenue, SW  
STOP 0237  
Washington, DC 20250-0237

CC: Delaware, New Jersey and Pennsylvania Congressional Delegations  
United States Trade Representative  
Director, Office of Management and Budget  
Maritime Exchange for the Delaware River and Bay  
Delaware River Port Authority  
Embassy of Chile



United States  
Department of  
Agriculture

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Marketing and  
Regulatory  
Programs

Agricultural  
Marketing  
Service

Mr. David A. Holzworth  
Lepon Holzworth & Kato, PLLC  
1225 19<sup>th</sup> Street, NW  
Washington, DC 20036-2456

In reply, please refer to  
FOIA No. 89-05

Washington, DC  
20250

Dear Mr. Holzworth:

This is an interim response to your Freedom of Information Act (FOIA) request received in this office on June 6, 2005. You requested documents which covered data, reports, and analyses used to support a proposed rule to change the regulatory periods for California and imported grapes. For reference purposes, I have enclosed a copy of the first two pages of your June 3, 2005, letter with the list of requested items.

We have located documents partially responsive to your request and are ready to provide them to you. We have located documents generally responsive to items 1, 2, 3, 6, 7, 8, 9, and 11. Some of the items overlap with other items. We do not have documents relating to items 5 and 10 (Clarification: We do not have domestic storage data) or to items 4 and 12. The total number of pages we intend to release is approximately 260 pages. In addition, we intend to release a diskette with about 2000 pages of FOB prices.

Documents responsive to item 3 include approximately 360 pages of vessel browser reports for the period 2000 to 2004 prepared by the California Desert Grape League based on data from Sermaco, Inc. Executive Order 12600 and the Department of Agriculture (USDA) regulations (7 C.F.R. § 1.12) provide that whenever an agency cannot readily determine whether the information obtained from a person is privileged or confidential business information, the USDA must obtain and consider the views of the proprietary interest holder and provide the holder an opportunity to object to any decision to disclose the information. We are informing the proprietary interest holder of your request and asking for their comments.

You will receive a response concerning the vessel browser reports after consideration of any comments received from the reports' proprietary interest holder. We are, however, ready to provide you with all the other documents responsive to your request that we have located.

Under FOIA (5 U.S.C. § 552(a)(4)(A)), fees may be charged for search, review and duplication of requested documents. USDA's fee schedule is set forth at 7 CFR Part 1, Subpart A, Appendix A (4). Your request required research, review and duplication of approximately 260 pages for a total of \$1,050.00. Estimated charges are as follows:



Mr. David A. Holzworth

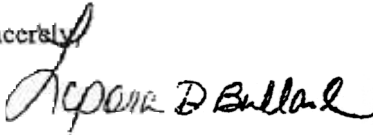
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45 hours of professional review time @ \$20 per hour	=	\$ 900.00
10 hours of clerical review and copying time @ \$10 per hour	=	\$ 100.00
260 copies @ .20 per page	=	\$ 52.00
<b>TOTAL</b>		<b>\$ 1,052.00</b>

If you wish to receive the documents collected, please send a check payable to the U.S. Treasury for \$526.00, half of the total fee. The remaining payment will be due upon your receipt of the documents.

You may appeal this action within 45 days from the date of the letter. Any such appeal should be in writing, addressed to the Administrator, Agricultural Marketing Service, Room 3071-S, Ag Stop 0201, 1400 Independence Ave., SW, Washington, DC 20250-0201. If you decide to file an appeal, please provide specific reasons why you believe a modification to our initial response is warranted. To facilitate processing your appeal, the phrase "FOIA appeal" should be placed in capital letters on the front of the envelope.

Sincerely,



Zipora D. Bullard  
Freedom of Information Officer

Enclosure